

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Forbearance)	WC Docket No. 05-170
of XO Communications, Inc., et, al.)	
Pursuant to 47 U.S.C. § 160(c))	

**COMMENTS OF
BELLSOUTH CORPORATION**

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I. INTRODUCTION AND SUMMARY

BellSouth Corporation ("BellSouth"), on behalf of its wholly owned affiliates, respectfully submits its comments opposing the Petition for Forbearance filed by XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., NuVox Communications, SNIp LiNK, LLC, and Xspedius Communications LLC (collectively "Petitioners").¹ Although couched as a request for forbearance, the petition is little more than a thinly veiled attempt to have the Commission revisit its *Triennial Review Remand Order*.² Indeed, two of the three issues upon which forbearance is being sought – the DS1 dedicated transport cap as applied to Enhanced Extended Loops ("EELs") and the eligibility criteria for EELs – are the subject of a reconsideration petition filed

¹ *Pleading Cycle Established for Comments on Petition for Forbearance of XO Communications, Inc., et al. Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 05-170, *Public Notice*, DA 05-2003 (rel. July 13, 2005).

² *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*").

by the very same parties, and the third issue – whether to allow access to unbundled DS1 loops in “predominantly residential” and “small office” buildings – was thoroughly considered and rejected by the Commission.³

Furthermore, the relief sought by Petitioners – an expansion of the unbundling obligations of incumbent local exchange carriers (“ILECs”) – is inconsistent with section 10 of the Telecommunications Act of 1996 (“1996 Act”). First, forbearance under section 10 applies only in the context of affirmative regulatory obligations. Because there is no general obligation to unbundle, elimination of the rules from which Petitioners seek forbearance would not and could not lawfully result in additional unbundling. The scope of an ILEC’s unbundling obligations can only be determined consistent with the impairment standard set forth in section 251(d)(2) and implemented pursuant to section 251(c)(3) – statutory provisions Petitioners blithely ignore.

Second, the Petition is inconsistent with the purpose of forbearance, which is to reduce regulatory burdens on carriers when those regulations are “unnecessary” and when such forbearance “is consistent with the public interest.”⁴ In this instance, Petitioners are not seeking to reduce regulation. On the contrary, their forbearance petition seeks to increase the regulation of ILECs by purporting to expand the ILECs’ unbundling obligations, which section 10 does not authorize.

³ Petition for Reconsideration of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., NuVox Communications, SNIp LiNK, LLC, Xspedius Communications LLC, and XO Communications, Inc., WC Docket No. 04-313, CC Docket No. 01-338 (filed Mar. 28, 2005) (“Birch Joint Petition”); *Triennial Review Remand Order*, 20 FCC Rcd 2619-23, ¶¶ 155-62 (rejecting proposals for “building-specific tests” for determining unbundled access to high-capacity loops).

⁴ 47 U.S.C. § 160(a).

Finally, even assuming the relief requested in the Petition was proper, which is not the case, Petitioners have failed to satisfy the statutory standards for forbearance. Notwithstanding Petitioners' claims to the contrary, eliminating the DS1 dedicated transport cap for EELs, abolishing the EEL eligibility criteria, and creating a "carve out" for unbundled DS1 loops in "predominantly residential" and "small office" buildings would not protect consumers, promote competition, or be in the public interest. Rather, granting such relief would simply result in a windfall to competitive local exchange carriers ("CLECs") at the expense of the facilities-based competition that Congress envisioned and for which this Commission stated a clear preference in its *Triennial Review Remand Order*. Accordingly, the Commission should deny the petition.

II. DISCUSSION

A. The Petition Is Nothing More Than A Procedurally Defective Request For Reconsideration Under The Guise Of Forbearance.

Petitioners plainly state their belief that the "rules" from which they seek forbearance "violate the Act and are unsupported by the record in the *Triennial Review Remand Order*," but at the same time they assert that they "do not seek forbearance on that ground."⁵ Of course, had Petitioners done so, the Commission would have no choice but to deny the petition as an untimely petition for reconsideration.⁶ Petitioners cannot avoid this result merely by labeling their request for the Commission to revisit its determinations in the *Triennial Review Remand Order* as a "petition for forbearance." Otherwise, Petitioners would be allowed to elevate form over substance.

⁵ Petition at 2.

⁶ As it is, the Commission should deny the timely petition for reconsideration filed by Petitioners for the reasons set forth in the Consolidated Response of BellSouth Corporation to Petitions for Reconsideration and Clarification, WC Docket No. 04-313, CC Docket No. 01-338 (filed June 6, 2005) ("BellSouth Consolidated Response").

B. Section 10 Does Not Authorize The Additional Unbundling That Petitioners Seek Through Forbearance.

There can be no serious dispute that Petitioners' request for forbearance is designed to impose additional unbundling obligations upon ILECs. Petitioners concede as much, describing their petition as seeking the Commission's forbearance from applying "unbundling limitations."⁷ However, the expansion of an ILEC's unbundling obligations through a forbearance petition is not authorized by section 10.

Section 10 only authorizes the Commission to eliminate affirmative regulatory obligations under certain circumstances.⁸ As the federal courts uniformly have recognized in reviewing the Commission's prior attempts at crafting lawful unbundling rules, however, there is no general obligation to unbundle.⁹ Because overbroad unbundling rules hamper investment and undermine facilities-based competition, the scope of the ILEC's duty to unbundle in section 251(c)(3) is constrained by the impairment standard in section 251(d)(2), and any unbundling rules adopted by the Commission must be consistent with these provisions. Importantly, Petitioners are not seeking forbearance of either section 251(d)(2) or section 251(c)(3).¹⁰

Because there is no pre-existing unbundling obligation, "forbearance" from the limitations on unbundling about which Petitioners complain could not lawfully result in the

⁷ Petition at 2.

⁸ 47 U.S.C. § 160(a).

⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387 (1999); *USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA P*"), *cert. denied*, 538 U.S. 940 (2003); *USTA v. FCC*, 359 F.3d 554, 576 (D.C. Cir.) ("*USTA IP*") (Congress's goal was not "to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate"), *cert. denied*, 125 S. Ct. 313 (2004).

¹⁰ Although section 10 authorizes the Commission to forbear from "applying the requirements of section 251(c)," it may only do so if the Commission determines "that those requirements have been fully implemented." 47 U.S.C. § 160(d). Petitioners do not address this issue or even mention this statutory provision.

additional unbundling Petitioners seek. On the contrary, any decision by the Commission to expand the unbundling requirements to which ILECs must adhere could only be accomplished through a lawful impairment analysis conducted consistent with sections 251(c)(3) and 251(d)(2), which is plainly outside the scope of a forbearance petition.

Petitioners' request that the Commission create a "carve out" from the Commission's DS1 unbundled loop rules for "predominantly residential" and "small office" buildings illustrates the problem. The Commission previously declined to adopt a building-specific impairment test for high-capacity loops because such an approach "would be impracticable and unadministrable"¹¹ and because a wire center test "strikes the appropriate balance and responds to the concerns expressed by the court in *USTA II*."¹² The Commission reached this result because, according to the Commission, "the wire center service area is the appropriate geographic unit at which to evaluate requesting carriers' impairment without access to unbundled high-capacity loops."¹³ The Commission could not grant "forbearance" and thereby purport to require ILECs to provide unbundled access to DS1 loops in "predominantly residential" and "small office" buildings, without first: (1) finding that such a building-specific impairment test was consistent with sections 251(c)(3) and 251(d)(2); (2) determining that CLECs were impaired without access to unbundled DS1 loops in such circumstances; and (3) distinguishing its contrary conclusions in the *Triennial Review Remand Order*. These issues are properly the subject of a rulemaking, not a forbearance petition.

¹¹ *Triennial Review Remand Order*, 20 FCC Rcd at 2620, ¶ 157.

¹² *Id.* at 2619-20, ¶ 155.

¹³ *Id.* at 2622, ¶ 161.

Indeed, as further evidence of the absurdity of Petitioners' request, the forbearance petition urges the Commission to "create" a "carve out" for unbundled DS1 loops in "predominantly residential" and "small office" buildings.¹⁴ Such creation, even assuming it were appropriate (which is not the case), would require the adoption of new unbundling rules. It would not involve the Commission's forbearing "from applying any regulation or any provision" of the 1996 Act, as required by section 10.¹⁵

For example, in order to implement the "carve out" requested by Petitioners, the Commission would be required to craft definitions for "predominantly residential" and "small office" buildings to which the "carve out" would apply. Although Petitioners put forth proposed definitions of these terms, such definitions are legally problematic and can only be vetted through a rulemaking, not a petition for forbearance.¹⁶

Upon a proper petition, of course, this Commission, under certain circumstances, may forbear from enforcing regulations and statutory provisions in order to reduce regulation on a petitioning telecommunications carrier or class of carriers. However, as a legal matter it may not forbear from "enforcing" deregulatory rules adopted in response to a federal court's vacatur in

¹⁴ Petition at 6.

¹⁵ 47 U.S.C. § 160(a).

¹⁶ For example, Petitioners propose to define a "small office" building as "any building with less than four DS3s of total activated ILEC capacity." Petition at 18. To put the Petitioners' suggestion in its proper context, note that each of the four DS3s has the capacity for 672 voice-grade equivalent lines. Thus, the Petitioners' suggestion that a "small office" building is one that might serve 2,687 (that is ((672 X 4)-1) voice lines) strains credulity. This proposal is nonsensical because it would include within its reach numerous buildings served predominantly by CLECs to which competitive supply is not only possible but actually occurring. Take a 5-story office building that is occupied by three customers, the two largest of which are served by CLECs and the third is served by an ILEC with only two DS3s of capacity. Under Petitioners' proposed definition, unbundled access to DS1 loops would be required in this building, even though it could not realistically be said that such facilities were "unsuitable for competitive supply," which is the fundamental inquiry in the Commission's impairment analysis. *USTA I*, 290 F.3d at 426, 427.

order to impose or re-impose additional, burdensome, and socially costly regulation on a telecommunications carrier or class of carriers. To do so would be contrary to the purpose of forbearance – to reduce regulatory burdens on carriers when those regulations are “unnecessary” and when such forbearance “is consistent with the public interest.”¹⁷ Here, Petitioners are not seeking to reduce regulation, but rather want to increase the regulation of ILECs through expanded unbundling obligations, which section 10 does not authorize. Accordingly, the petition should be denied.

C. The Petition Fails To Satisfy The Requirements Of Section 10.

Even assuming that forbearance was an appropriate vehicle for revisiting the Commission’s unbundling rules as requested by Petitioners (which is not the case), Petitioners have utterly failed to satisfy the requirements for forbearance. Petitioners argue no new facts to support their forbearance petition, and merely aping the statutory language of section 10 and rearguing points considered and rejected by the Commission is insufficient.

1. DS1 unbundled loop “carve out”

The premise of Petitioners’ request that the Commission forbear from applying its DS1 unbundling rules to create a “carve out” for “predominantly residential” and “small office” buildings is that CLECs are allegedly unable to serve such buildings.¹⁸ This premise is flawed in several respects.

¹⁷ 47 U.S.C. § 160(a); *see also* 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (remarks of Sen. Pressler) (noting that forbearance would allow the Commission “to reduce the regulatory burdens on a carrier when competition develops, or when the [Commission] determines that relaxed regulation is in the public interest”).

¹⁸ Petition at 8.

First, ILECs are relieved from providing unbundled access to DS1 loops only in those wire centers having both four or more fiber-based collocators and at least 60,000 business lines.¹⁹ Very few wire centers satisfy this test – according to Verizon, only 0.4% of its wire centers qualify for relief from DS1 loop unbundling, while only 0.7% of BellSouth’s wire centers qualify.²⁰ Thus, in the vast majority of wire centers, CLECs currently have access to unbundled DS1 loops to serve predominantly residential and small office buildings.

Second, even in those limited circumstances where DS1 loop unbundling relief was granted, according to the Commission’s estimates, those wire centers with 60,000 business lines and four or more fiber-based collocators have an average of 13 fiber-based collocators, and 75% have eight or more fiber-based collocators, which indicated to the Commission that “there is particularly extensive competitive fiber build-out.”²¹ Such extensive competitive fiber deployment in these wire centers warrants unbundling relief, particularly when, as the Commission has acknowledged, fiber-based collocation “underestimate[s]” competitive deployment.²²

¹⁹ *Triennial Review Remand Order*, 20 FCC Rcd at 2614, ¶ 146.

²⁰ See <http://www22.verizon.com/wholesale/attachments/verizonwirecentersexempt.xls>; Ex Parte Letter from Bennett L. Ross, Counsel for BellSouth, to Thomas Navin, FCC, WC Docket No. 04-313 (June 3, 2005).

²¹ *Triennial Review Remand Order*, 20 FCC Rcd at 2632, ¶ 180.

²² *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1 & 98-157; CCB/CPD File No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14274, ¶ 95 (1999) (“*Pricing Flexibility Order*”); *id.* at 14280, ¶ 104 (“It ... seems likely ... that the extent to which competitors have collocation arrangements in an MSA is probative of the degree of sunk investment by competitors in channel terminations [i.e., loops] between the end office and the customer premises throughout the MSA.”).

Third, the combination of competitive fiber deployment and access to and use of tariffed services allows CLECs to meet the demand for high-capacity facilities wherever it exists, including in “predominantly residential” and “small business” offices. According to public information made available by competing providers themselves, CLECs have access to at least *half a million* buildings on their fiber networks where the building is connected to the CLEC’s network using its own high-capacity facility or a facility leased from an alternative provider, including special access obtained from an ILEC.²³ Thus, Petitioners’ insistence that CLECs cannot serve predominantly residential and small business offices without access to unbundled DS1 loops is belied by the facts.

Equally fallacious is Petitioners’ suggestion that the Commission’s DS1 loop unbundling rules were not “implemented specifically for the protection of consumers.”²⁴ As the Commission recognized in eliminating unbundled access to switching, consumers are harmed by excessive unbundling, which serves as “a disincentive to competitive LECs’ infrastructure investment.”²⁵ As the industry’s experience with UNE-P vividly underscored, consumers benefit from true facilities-based competition, not the sort of “synthetic” competition fostered by excessive unbundling. As the Commission correctly noted, “consistent with the D.C. Circuit’s directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.”²⁶ The Commission’s reasoning applies equally to DS1 loops and eviscerates Petitioners’ demand for yet more unbundling under the guise of forbearance.

²³ UNE Fact Report 2004, WC Docket 04-313, at III-9 to III-20 (filed Oct. 7, 2004).

²⁴ Petition at 15.

²⁵ *Triennial Review Remand Order*, 20 FCC Rcd at 2653, ¶ 218.

²⁶ *Id.*

2. DS1 dedicated transport cap

The Commission's rule that limits a CLEC to the purchase of 10 individual circuits of unbundled DS1 transport on a particular route is, contrary to Petitioners' assertions here and elsewhere, fully supported by the evidence in the record of the *Triennial Review Remand Order* proceeding. The DS1 transport cap works to encourage CLECs to manage their networks efficiently so that when a sufficient amount of traffic is passed along a particular route, the CLEC should use a higher-capacity facility. The self-serving "efficient EELs" analysis, like both their arguments with respect to the DS1 loop test in this petition and their arguments on DS1 transport in their pending petition for reconsideration of the *Triennial Review Remand Order*,²⁷ fundamentally ignores the Commission's impairment standard, which requires that impairment be determined based upon a "reasonably efficient competitor" and not a carrier's "particular business strategy."

On those routes where CLECs are not impaired without unbundled access to DS3 transport, the Commission reasonably concluded that a CLEC should self-provide transport or obtain transport from another carrier when it requires more than 10 DS1 transport links.²⁸ This conclusion applies equally whether DS1 transport is involved on a standalone basis or as part of an EEL.

Petitioners' argument that "DS1/DS1 EELs impairment will always exist whenever DS1 loop impairment exists, regardless of the number of DS1 transport circuits obtained by a

²⁷ In their petition for reconsideration, the instant petitioners insist that the cap on DS1 transport should not apply to EELs, insisting that "it would substantially undermine the availability of non-multiplexed DS1 EELs." Birch Joint Petition at 5.

²⁸ *Triennial Review Remand Order*, 20 FCC Red at 2605, ¶ 128 (noting that the 10-circuit limitation on DS1 transport "is consistent with the pricing efficiencies of aggregating traffic").

carrier”²⁹ is inaccurate. This argument hinges on the false assumption that CLECs cannot multiplex DS1s into DS3 transport facilities. For any “reasonably efficient competitor,” multiplexing is an ordinary and routine network engineering practice, and necessary multiplexing equipment is readily available to both ILECs and CLECs alike, and Petitioners do not and cannot contend otherwise.

Although Petitioners insist that forbearance is appropriate in order to “eliminate[] the anomaly created by the differences in the transport cap and the loop cap,”³⁰ no such “anomaly” exists. On the contrary, the Commission’s decision to cap DS1 transport circuits at 10 is perfectly consistent with the Commission’s treatment of DS1 loops, which are capped at 10 “to any single building.”³¹ As the Commission explained in the DS1 loop context, “[t]he record indicates that a competitor serving a building at the ten DS1 capacity level or higher would find it economic” to move to a DS3 serving arrangement.³² That exact same logic applies to DS1 transport. Just as with loops, a carrier serving a particular transport route “at the ten DS1 capacity level or higher would find it economic” to move to a DS3 serving arrangement.³³

Accordingly, there is no principled basis for distinguishing between loops and transport when applying the limitation on DS1 circuits. In short, the DS1 cap – applied to both loops and transport – encourages CLECs to move to a more efficient DS3 serving arrangement where their capacity warrants it. Far from being “anomalous,” that common-sense result is necessary to

²⁹ Petition at 20.

³⁰ *Id.* at 22.

³¹ 47 C.F.R. § 51.319(a)(4)(ii); *Triennial Review Remand Order*, 20 FCC Rcd at 2633, ¶ 181 (“we establish a cap of ten DS1 loops that each carrier may obtain to a building”).

³² *Triennial Review Remand Order*, 20 FCC Rcd at 2633, ¶ 181.

³³ *Id.*; *see also id.* at 2605-06, ¶ 128.

encourage efficient serving arrangements and is completely consistent with the Commission's "reasonably efficient competitor" standard for assessing impairment.

3. EEL eligibility criteria

Petitioners seek forbearance of the Commission's EEL eligibility criteria, arguing that the *Triennial Review Remand Order* "removed any rationale for the continued imposition" of such criteria.³⁴ This argument ignores the fact that these eligibility criteria are intended to prevent providers of "exclusively long-distance voice or data services" from obtaining EELs.³⁵ In other words, the current EEL eligibility criteria are supposed to prevent CLECs from obtaining EELs on an unbundled basis to provide a service – long distance – as to which they are not impaired. It would hardly be in the public interest to eliminate the EEL eligibility criteria and thereby facilitate unbundled access to facilities to which CLECs are not lawfully entitled, despite Petitioners' brazen claims to the contrary.

That the Commission has a rule prohibiting carriers from using unbundled network elements to provide exclusively long distance services or wireless services does not obviate the need for EEL eligibility criteria, which serve as a test to determine whether that rule is being followed. Without EEL eligibility criteria, ILECs would be left at the mercy of carriers providing exclusively long distance services that seek to game the system by converting special access to EELs to obtain favorable rates or to otherwise engage in regulatory arbitrage. Just as the Commission should not dilute the eligibility criteria on reconsideration, it should not forbear

³⁴ Petition at 24.

³⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17354-55, ¶ 598 (2003) (subsequent history omitted) ("*Triennial Review Order*").

from applying the criteria it adopted. It cannot do so and prevent the gaming and arbitrage that would undoubtedly result.

While challenging the EEL eligibility criteria, Petitioners cannot seriously dispute that these criteria prevent long distance carriers from “obtain[ing] favorable rates or otherwise engage[ing] in regulatory arbitrage.”³⁶ This was the Commission’s intent in establishing the EEL eligibility criteria, as the *Triennial Review Order* makes clear. As the Commission explained:

[T]he criteria afford high-capacity EEL access to an integrated communications provider that sells a bundle of local voice, long-distance voice, and Internet access to small businesses, because such a provider is competing against the incumbent LEC’s local voice offerings. *In contrast, a provider of exclusively long-distance voice or data services that seeks to use high-capacity UNE facilities without providing any local services would fall short of one of the tests, if not all.*³⁷

Despite the change in the Commission’s approach to ensuring that long distance carriers do not have access to unbundled network elements, the Commission’s recognition of “the harms associated with gaming by long-distance providers” has remained constant.³⁸ The EEL eligibility criteria were designed to prevent such gaming, and consumers would not be protected, nor the public interest served, if such gaming were allowed to occur, which would be the case if these criteria were eliminated as requested by Petitioners.

³⁶ Birch Joint Petition at 8 (quoting *Triennial Review Order*, 18 FCC Rcd at 17351, ¶ 591).

³⁷ *Triennial Review Order*, 18 FCC Rcd at 17354-55, ¶ 598 (emphasis added) (citations omitted).

³⁸ *Id.* at 17355, ¶ 599; *see also id.* at 17356-57, ¶¶ 604-05 (explaining that the collocation EEL eligibility requirement was adopted because collocation “is traditionally not used by interexchange carriers” and necessitates that the “collocation must be within the incumbent LEC network, and cannot be at an interexchange carrier POP or ISP POP”); *see also Triennial Review Remand Order*, 20 FCC Rcd at 2662, ¶ 230 (declining to adopt an across-the-board prohibition on special access conversions, in part, because “a significant percentage of the special access channel terminations that the BOCs sell to carriers are provided to interexchange carriers ... and are therefore largely shielded already from potential conversion to UNEs”) (citations omitted).

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Forbearance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of September 2005 served a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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